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No. 98-89

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

J.A. CROSON COMPANY,
Petitioner,
v.
J.A. GUY, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, LOCAL NO. 189's BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Supreme Court correctly determined that federal law preempts a non-union contractor's attempt to use its misconstruction of Ohio's prevailing wage law "to restrain or inhibit" a union's federally protected operation of its "job targeting program?"

LISTING OF ADDITIONAL PARTIES

Respondents

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local No. 189.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LISTING OF ADDITIONAL PARTIES	ii
TABLE OF AUTHORITIES	v
CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	8
I. INTRODUCTION	8
II. THE OHIO SUPREME COURT'S DECISION IS CORRECT	9
III. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR THAT OF ANY FEDERAL COURT OF APPEALS	13
IV. THE OHIO SUPREME COURT CORRECTLY DETERMINED THAT *MACHINISTS* PREEMPTION EXCEPTIONS DO NOT APPLY WHEN DETERMINING WHETHER A STATE LAW CLAIM IS PREEMPTED UNDER *GARMON*	16
V. CROSON'S CLAIM HAS NO APPLICATION BEYOND THE PARTICULAR OHIO STATUTE AND ADMINISTRATIVE REGULATION AT ISSUE HEREIN	18
CONCLUSION	20

TABLE OF CONTENTS—Continued

APPENDIX Page

29 U.S.C. § 157 ..... 1a

R.C. 4115.07 ..... 1a

R.C. 4115.10 ..... 2a

Ohio Adm. Code § 4101:9-4-07 ..... 5a

TABLE OF AUTHORITIES

Cases Page

Brown v. Hotel & Restaurant Employees & Bartenders Internatl. Union Local 54, 468 U.S. 491 (1984) 12

Building and Constr. Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc., 507 U.S. 218 (1993) 9, 10

Building and Constr. Trades Dep't v. Reich, 40 F.3d 1275 (D.C.Cir. 1994) 13, 14, 15

California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316 (1997) 13, 14

Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100, 421 U.S. 616 (1975) 14, 15

Independent Elec. Contractors of Greater Cincinnati, Inc. v. County of Hamilton, 101 Ohio App.3d 580, 656 N.E.2d 18, *jurisdictional motion overruled*, 73 Ohio St.3d 1410, 651 N.E.2d 1308 (1995) 6

International Bhd. of Elec. Workers, Local 11 v. Aubry, 41 Cal.App.4th 1632, 49 Cal.Rptr.2d 759 (1996) 15, 16

International Bhd. of Elec. Workers v. Brock, 68 F.3d 1194 (9th Cir. 1995) 13, 14, 15

J.A. Croson Co. v. Central Ohio Joint Vocational School Dist., 104 Ohio App.3d 146, 661 N.E.2d 250, *jurisdictional motion overruled*, 74 Ohio St.3d 1418, 655 N.E.2d 738 (1995), *cert. denied*, 517 U.S. 1155 (1996) 6

Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) 10, 16, 17

Manno Elec., Inc., 321 NLRB 278, 153 LRRM 1107 (1996) 7, 11, 13, 14

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) 9, 14, 16, 17

San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) 9, 10, 13, 14, 17

Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180 (1978) 12, 13

TABLE OF AUTHORITIES—Continued

Statutes Page

29 U.S.C. § 151 14
29 U.S.C. § 157 ..... 8, 11
29 U.S.C. § 411(a) (3) 2
29 U.S.C. § 1144 13
40 U.S.C. § 276a 14
R.C. Chapter 4115 4
R.C. 4115.03 4
R.C. 4115.07 ..... 4, 5, 18
R.C. 4115.10(D) 4, 5, 8, 14, 18, 19

Other

Ohio Adm. Code § 4101:9-4-07 ..... 5, 6, 14, 18
Ohio Adm. Code § 4101:9-4-07(A) (1) 19
Ohio Adm. Code § 4101:9-4-07(B) (6) 18, 19
Advice Memorandum. International Bhd. of Elec. Workers, Local 82 (Wagner-Smith Co.), Nos. 9-CA-30588, 9-CB-8493, 9-CB-8511 (July 8, 1993) 15, 19

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Respondent United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local Union 189 ("Local 189") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ohio Supreme Court's decision in this case. The Ohio Supreme Court's opinion is reported at 81 Ohio St.3d 346, 691 N.E.2d 655 (1998), and is reproduced in the appendix to the Petition at 1a.

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The Petitioner fails to fully set out the relevant portions of the Ohio statutory and administrative code provisions involved in this case. For the Court's convenience, 29 U.S.C. § 157, R.C. 4115.07 and 4115.10, and Ohio Adm. Code § 4101:9-4-07 are, therefore, set forth in their entirety in the appendix hereto.

STATEMENT OF THE CASE

On May 28, 1988, Local 189 established the "Plumbers and Pipe Fitters Local 189 Industry Advancement Program" to finance what is generally known in the construction industry as a "job targeting program." Local 189's Industry Advancement Program was designed to promote the organized mechanical construction industry within Local 189's jurisdiction by assisting signatory union contractors in competing for contracts, and thereby further the union's legitimate goal of providing increased employment opportunities for its members.

Like most job targeting programs, Local 189's Industry Advancement Program was funded solely by union members through voluntary union dues. By majority secret ballot vote, Local 189 members increased their dues to three and three-quarters percent (3¾%) of their gross wages, two percent (2%) of which was to be placed in the union's Industry Advancement Fund. Like all of Local 189's membership dues, the two percent (2%) job targeting dues are subject to approval by periodic secret ballot and are withheld from members' wages pursuant to voluntary dues check-off authorizations executed by each member. See 29 U.S.C. § 411(a)(3). The Industry Advancement Program is financed exclusively with union dues, and no contractor is permitted to, or ever has, deposited any of its own money into the fund.

Local 189's Industry Advancement Program is operated exclusively by Local 189 to benefit its members, not con-

tractors. No contractor, or association of contractors, has any control over any portion of Local 189's membership dues or the operation of the job targeting program. The amount of dues, the purposes for which such dues are used, and the Industry Advancement Program are not subjects of collective bargaining between the Local 189 and its signatory contractors.

Although signatory contractors may suggest that particular jobs be "targeted," Local 189 makes such determinations in its sole and absolute discretion. Contractors have no guarantee that they will ever receive any monies from Local 189's Industry Advancement Fund or that they will ever work on a "targeted" job. In considering whether to target a particular job, Local 189 asks one or more signatory contractors to estimate the number of hours of labor within Local 189's work jurisdiction necessary to complete the job. If Local 189 determines to target a particular job, it notifies all signatory contractors of its decision and the amount of the job targeting grant devoted to the project, normally stated as a set amount per hour of labor up to a maximum number of hours. All signatory contractors may then use this information in preparing and submitting a bid for the project.

If any signatory contractor is awarded the contract, Local 189 and that contractor enter into a "Memorandum of Market Recovery Agreement." The contractor is required at all times to pay all of its employees the wages and benefits required by the collective bargaining agreement. Pursuant to certified payroll reports provided by the contractor to Local 189 for the targeted job, the union then pays the contractor an amount equal to the number of hours worked times the targeted rate.

Respondent J.A. Guy, Inc. ("J.A. Guy") is, and at all times relevant herein was, signatory to the collective bargaining agreement between Local 189 and the Mechanical Contractors Association of Central Ohio. Pursuant to dues check-off authorization forms signed by all of its em-

ployees engaged in the plumbing and pipe fitting trades, J.A. Guy withheld three and three-quarters percent (3¾%) of its employees wages as union dues. Those dues were transmitted to Local 189 through its health and welfare fund. J.A. Guy withheld such dues for its employees on all jobs, targeted and non-targeted.

In 1990 and 1991, J.A. Guy and Petitioner J.A. Croson Company ("Croson") submitted bids for two separate contracts for the Pickaway County Jail and its water softening system. Because both contracts were for "construction" of a "public improvement" for a "public authority," see R.C. 4115.03, they were subject to Ohio's prevailing wage law, R.C. Chapter 4115. J.A. Guy submitted the low bid for both projects, and consequently was awarded both contracts.[1] During the course of both projects, J.A. Guy deducted from its employees' wages three and three-quarters percent (3¾%) union membership dues and transmitted those dues to Local 189.

On June 15, 1993, Croson commenced the present action against J.A. Guy asserting that J.A. Guy's withholding of two percent (2%) of its employees' wages violated Ohio's prevailing wage law, and specifically R.C. 4115.07 and 4115.10(D). Those sections provide, in relevant part:

> All contractors and subcontractors required by sections 4115.03 to 4115.16 of the Revised Code, and the action of any public authority to pay not less than the prevailing rate of wages shall make full payment of such wages in legal tender, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description. This section does not apply where the employer and employee enter into an agreement in writing at the beginning of any term of employment covering deductions for food, sleeping

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[1] The jail project was "targeted," and the water softening system project was not.

> accommodations, or other similar item, provided such agreement is submitted by the employer to the public authority fixing the rate of wages and is approved by such public authority as fair and reasonable. * * *

R.C. 4115.07.

> Where persons are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for self or any other person, shall request, demand, or receive, either before or after the person is engaged, that the person so engaged pay back, return, donate, contribute, or give any part or all of the person's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent the procuring or retaining of employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. *This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.*

R.C. 4115.10(D) (emphasis added).[2]

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[2] Without any elliptical indication, Croson omitted the italicized sentence—language that is central to its claim in this case—from the text of the statutory provisions set forth in its Petition. See Petition at 2-3. In its complaint, Croson also alleged that J.A. Guy's withholding of Local 189 members' dues violated Ohio Adm. Code § 4101:9-4-07, which Croson also failed to set out verbatim as required by this Court's rules. That section provides, in pertinent part:

> (A) The following deductions from wages may be made without application to and approval of the bureau:
>
> (1) *Any deduction from wages required by federal, state, or local law;*
>
> * * *
>
> (B) The following deductions from wages may be made only if, prior to commencement of work by the employee on any

Croson's complaint challenged only J.A. Guy's withholding of job targeting dues from its employees' wages. Croson did not allege that Local 189's targeting of the jail project, or any other project, violated the prevailing wage law. Nor did Croson assert that the job targeting program itself violated any state or federal law.[3]

On March 28, 1995, the Court of Common Pleas for Pickaway County, consistent with two well-reasoned Ohio appellate court decisions, entered summary judgment ruling that Croson's claim was preempted by federal labor law. App. at 80a. See *Independent Elec. Contractors of Greater Cincinnati, Inc. v. County of Hamilton*, 101 Ohio App.3d 580, 656 N.E.2d 18, *jurisdictional motion overruled*, 73 Ohio St.3d 1410, 651 N.E.2d 1308 (1995), and *J.A. Croson Co. v. Central Ohio Joint Vocational School Dist.*, 104 Ohio App.3d 146, 661 N.E.2d 250, *jurisdictional motion overruled*, 74 Ohio St.3d 1418, 655 N.E.2d 738 (1995), *cert. denied*, 517 U.S. 1155 (1996). On October 4, 1996, the Court of Appeals for Pickaway County, Fourth Appellate District, reversed. App. at 24a. Local 189 and J.A. Guy thereafter timely appealed to the Ohio Supreme Court.

The Court of Appeals subsequently certified its decision to the Ohio Supreme Court as in conflict with the

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project, employers procure and maintain, in writing, proof of voluntary deductions signed by the employee:

* * *

(6) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments, provided that a collective bargaining agreement between the employer and representatives of its employees permits such deductions and such deductions are not otherwise prohibited by law.

* * *

Ohio Adm. Code § 4101:9-4-07 (emphasis added).

[3] J.A. Guy denied liability, but filed a third-party complaint against Local 189 asserting that, to the extent it was held liable, Local 189 was responsible for that liability.

two prior Ohio appellate decisions addressing the issue. On January 29, 1997, the Ohio Supreme Court accepted Local 189's and J.A. Guy's discretionary appeals, *J.A. Croson Co. v. J.A. Guy, Inc.*, 77 Ohio St.3d 1547, 674 N.E.2d 1186 (1997), and further ruled that a conflict between appellate decisions indeed existed. *J.A. Croson Co. v. J.A. Guy, Inc.*, 77 Ohio St.3d 1546, 674 N.E.2d 1185 (1997). The Court directed the parties to brief the following question:

> Whether federal labor law preempts a claim that a union employer's deduction of union dues for a union "Industry Advancement" or "job targeting" fund violates Ohio's Prevailing Wage Law, R.C. 4115.01, *et seq.*, and state regulations adopted thereunder.

J.A. Croson Co. v. J.A. Guy, Inc., 77 Ohio St.3d at 1546, 674 N.E.2d at 1185.

On April 8, 1998, the Ohio Supreme Court unanimously answered the certified question in the affirmative and reversed the decision of the Court of Appeals for Pickaway County. *J.A. Croson Co. v. J.A. Guy, Inc.*, 81 Ohio St 3d 346, 691 N.E.2d 655, App. at 1a (1998).

Significantly, the Ohio Supreme Court did not rule that any Ohio statute or administrative regulation was preempted by federal labor law. Rather, the Ohio Court merely held that Croson's claim, which Local 189 maintains was based upon a strained construction of the statute and rules, was preempted. In the Ohio Supreme Court's words, "[i]n light of the NLRB's holding in *Manno*, Section 7 of the NLRA preempts state regulation under Ohio Adm. Code 4101:9-4-07(B)(6) and R.C. 4115.10(D) *to the extent that those provisions could be construed* to restrain or inhibit the federally protected use of job targeting programs." *J.A. Croson Co.*, 81 Ohio St.3d at 358, 691 N.E.2d at 665, App. at 22a (citing *Manno Elec., Inc.*, 321 NLRB 278, 153 LRRM 1107 (1996)) (emphasis added) (footnote omitted).

Croson thereafter timely petitioned this Court for a writ of certiorari to the Ohio Supreme Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. INTRODUCTION.

The unanimous decision of the Ohio Supreme Court carefully traced the full body of this Court's decisions concerning preemption under § 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157. In its petition, Croson has failed to establish any error in the Ohio Supreme Court's preemption analysis or with its narrow, pointed ruling.

Importantly, the Ohio Supreme Court did not rule that any Ohio statute or administrative regulation was preempted by federal law. Rather, the Court simply ruled that to the extent Croson's claim required a certain construction be imposed upon Ohio's statute and regulations, that construction was preempted by federal labor law.[4] Thus, the decision of the Ohio Supreme Court has no effect beyond the particular Ohio statute and regulation at issue herein. Croson has advised this Court of no litigation anywhere else in the nation raising this, or a similar, issue under a state statute or regulation substantially similar to Ohio's. In the absence of any indication that the Ohio Supreme Court's decision will have any effect outside of the particular facts and circumstances of

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[4] The construction advanced by Croson has never been adopted by any Ohio court. For Croson's construction to prevail, the final sentence of R.C. 4115.10(D) ("This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.") would have to be read out of the statute. Perhaps this is what motivated Croson to omit this sentence from its "verbatim" reproduction of R.C. 4115.10(D) in its Petition. Unless and until the General Assembly takes this unlikely action, Croson could not succeed on the merits of its claim. This case, therefore, has very little impact beyond this particular lawsuit.

Croson's claim and Ohio's statute and regulation, this case does not warrant this Court's full review.

II. THE OHIO SUPREME COURT'S DECISION IS CORRECT.

The Ohio Supreme Court's decision in this case is a clear, textbook analysis of NLRA preemption as set forth in this Court's decision in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), and its progeny. Croson has failed to demonstrate that the Ohio court misapplied any of this Court's decisions. Accordingly, this Court should deny review of the Ohio Supreme Court's decision.

> The Court has articulated two distinct NLRA pre-emption principles. The so-called *Garmon* rule, see *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA.
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> * * * *
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> A second pre-emption doctrine protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning conduct that Congress intended to be unregulated. The doctrine was designed, at least initially, to govern pre-emption questions that arose concerning activity that was neither arguably protected against employer interference by §§ 7 and 8(a)(1) of the NLRA, nor arguably prohibited as an unfair labor practice by § 8(b) of that Act. 29 U.S.C. §§ 157, 158(a)(1) and (b). Such action falls outside the reach of Garmon pre-emption.

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 748-49 (1985).[5] See also *Building and Constr.*

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[5] As discussed below, see *infra* at 16-17, Respondents have never asserted that Croson's claim was preempted under the second of

Trades Council of the Metro. Dist. v. Associated Builders and Contractors of Mass./R.I., Inc., 507 U.S. 218, 224-26 (1993).

The Ohio Supreme Court faithfully applied the *Garmon* preemption doctrine, making only those distinctions made by this Court itself: (1) between *clearly* prohibited or protected activity and *arguably* prohibited or protected activity, and (2) between prohibited conduct and protected conduct. *J.A. Croson Co.*, 81 Ohio St.3d at 352-54, 691 N.E.2d at 661-62, App. at 11a-15a. Croson challenges neither of these distinctions.

As this Court noted in *Garmon*, when the NLRB has decided that an activity is either protected or prohibited, federal law preempts all state jurisdiction to regulate that conduct:

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Garmon, 359 U.S. at 244.

The *Garmon* Court plainly articulated that "[i]f the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction." *Id.* at 245. On the other hand, if it is not clear that a particular activity is either protected or prohibited, but is arguably so, then "courts are

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these two doctrines, the so-called *Machinists* preemption. See *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976). Accordingly, the "minimum labor standards" exception to *Machinists* preemption advanced by Croson is inapplicable.

not the primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." *Id.* at 244-45.

As the Ohio Supreme Court correctly observed, the NLRB has concluded, in a decision subject to federal judicial review, that job targeting is an activity protected under § 7 of the NLRA:

> Section 7 provides that employees shall have the right "to engage in other concerted activities for the purpose of . . . other mutual aid and protection." The objectives of the "job targeting program" are to protect employee's jobs and wage scales. These objectives are protected by section 7.

Manno Elec., Inc., 321 NLRB 278, 153 LRRM 1107 (1996). Thus, under this Court's decision in *Garmon*, Local 189's establishment and maintenance of its job targeting program is "clearly," or "actually," protected activity. Accordingly, the Ohio Supreme Court reached the only conclusion it could—Croson's attempt to use the state prevailing wage law and Ohio courts to interfere with Local 189's job targeting program is preempted.[6]

Furthermore, the Ohio Supreme Court properly observed that federally "protected" activity implicates supremacy concerns to a greater degree than "prohibited" activity:

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[6] In its Petition, Croson incorrectly asserts that the Ohio Supreme Court held that "job targeting programs are *absolutely protected* by the NLRA . . . ." Petition at 13 (emphasis in original). Croson apparently attempts to leave this Court with the impression that the Ohio court held that "job targeting [is] some kind of absolute right," Petition at 29, and, therefore, immunized job targeting programs from all judicial review. The Ohio Supreme Court, however, held that job targeting programs are "actually" or "clearly" protected, not "absolutely" protected, see *J.A. Croson Co.*, 81 Ohio St.3d at 354-55, 691 N.E.2d at 662-63, App. at 16a-17a, and Croson's attempt to elevate the importance of the Ohio court's decision by the substitution of terms must fail.

> "Apart from notions of 'primary jurisdiction,' there would be no objection to state courts' and the NLRB's exercising concurrent jurisdiction over conduct *prohibited* by the federal Act." * * * *Sears, [Roebuck & Co. v. San Diego County Dist. Council of Carpenters,]* 436 U.S. [180] at 199-200 . . . [(1978)]. Considerations of federal supremacy, however, are implicated to a greater extent where conduct is protected under Section 7 of the NLRA. *Id.* Where conduct is protected, "[t]he danger of permitting local adjudications is not that timing or form of relief might be different from what the Board would administer, but rather that the local court might restrain conduct that is in fact protected by the Act."
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> * * *
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> Where state regulation would, in fact, inhibit federally protected activity, there is no need to invoke the primary-jurisdiction rationale set forth in *Garmon*. "The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, such activity is obviously beyond the reach of all state power."

J.A. Croson Co., 81 Ohio St.3d at 353-54, 691 N.E.2d at 662, App. at 14a-15a (some citations omitted).[7] Because the activity it ultimately seeks to "thwart," *J.A. Croson Co.*, 81 Ohio St.3d at 355, 691 N.E.2d at 663, App. at 16a, is clearly *protected* activity, the Ohio Su-

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[7] The Ohio Supreme Court also observed that this Court "has 'frequently applied traditional pre-emption principles to find state law barred on the basis of an actual conflict with § 7. If employee conduct is protected under § 7, then state law which interferes with the exercise of these federally protected rights creates an actual conflict and is pre-empted by direct operation of the Supremacy Clause.' *Brown v. Hotel & Restaurant Employees & Bartenders Internatl. Union Local 54* (1984), 468 U.S. 491, 501 . . . ." *Id.* Local 189 has consistently argued throughout the proceedings in this case that Croson's claim was preempted under both *Garmon* and the Supremacy Clause.

preme Court properly determined that Croson's claim is preempted under the NLRA.[8]

III. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR THAT OF ANY FEDERAL COURT OF APPEALS.

Croson argues that the decision of the Ohio Supreme Court in this case is in "direct conflict" with *California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316 (1997), *Building and Constr. Trades Dep't v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994), and *International Bhd. of Elec. Workers v. Brock*, 68 F.3d 1194 (9th Cir. 1995). See Petition at 9-11, 14-16. None of these cases, however, raised the narrow NLRA preemption question raised by this case, and none of the cited cases adverted to, much less decided, that NLRA preemption question.

Dillingham Constr., supra, involved preemption under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144. *Dillingham Constr.*, 519 U.S. at ——, 117 S.Ct. at 835. ERISA preemption requires a completely different analysis than NLRA preemption. Neither Local 189 nor J.A. Guy have ever asserted that R.C.

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[8] The most significant consequence of the NLRB's ruling in *Manno Elec.* that job targeting is, in fact, a "protected" activity is that it invalidates Croson's assertion that *Garmon* preemption does not apply because it could not present its precise claim to the NLRB. See Petition at 25-26. The Ohio Supreme Court, citing, *inter alia*, this Court's decision in *Sears, Roebuck & Co., supra*, correctly observed, however, that this exception to *Garmon* preemption does not apply when the NLRB has ruled that the conduct at issue is *actually protected*. *J.A. Croson Co.*, 81 Ohio St.3d at 356, 691 N.E.2d at 663-64, App. at 19a. See *Sears, Roebuck & Co.*, 436 U.S. at 202 ("We are therefore persuaded that *the primary jurisdiction rationale* does not provide a *sufficient* justification for pre-empting state jurisdiction over *arguably protected conduct* when the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so.") (some emphasis added).

4115.10(D), Ohio Adm. Code § 4101:9-4-07, or Croson's claim are preempted under ERISA. Consequently, the Ohio Supreme Court's decision in this case, which addressed only NLRA preemption, cannot legitimately be said to conflict with this Court's decision in *Dillingham Constr.*[9]

Nor is the Ohio Supreme Court's decision in conflict with *Reich, supra*, or *Brock, supra.* Initially, *Garmon* preemption was neither raised nor addressed by the courts in *Reich* and *Brock*, and for the most straightforward reasons. Both decisions pre-date the NLRB's decision in *Manno Elec., supra*, which forms the basis of Respondents' assertion of *Garmon* preemption. It is disingenuous, therefore, to assert that those decisions somehow decide the precise question raised here.

Furthermore, both federal appellate decisions cited by Croson deal with the deduction of job targeting dues on *federal* public construction projects governed by the *federal* Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.* See *Connell Constr. Co. v. Plumbers & Steamfitters Local*

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9 Nevertheless, Croson argues that if state prevailing wage laws are not preempted under ERISA's "broad" preemption provision, those laws also must not be preempted under the NLRA. Petition at 9-10, 14-16. This argument is doubly wrong.

First, Respondents have never asserted that Ohio's prevailing wage law itself is preempted, but rather only that Croson's particular claim here is preempted to the extent that it seeks to prohibit Local 189 from deducting dues permitted by the NLRA or to otherwise regulate Local 189's use of its union dues.

Second, ERISA and the NLRA are completely different animals enacted for different purposes. On the one hand, the fundamental purpose of the NLRA is to encourage collective bargaining and the industrial stability flowing therefrom. See NLRA § 1, 29 U.S..C § 151. On the other hand, the fundamental purpose of ERISA is to "comprehensively regulate[] employee pension and welfare plans." *Metropolitan Life Ins. Co.*, 471 U.S. at 728. Thus, it is neither surprising nor "inexplicable" that the Ohio Supreme Court refused to confuse the issue before it, *i.e., Garmon* preemption, by including irrelevant ERISA preemption decisions in its discussion.

Union No. 100, 421 U.S. 616, 635 (1975) (After holding that a union's agreement with a construction contractor was subject to federal anti-trust laws, the Court stated that "[t]he use of state anti-trust law to regulate union activities in aid of organization must . . . be preempted because it creates a substantial risk of conflict with policies central to federal labor law."). No state statute was before the *Reich* or *Brock* courts, and consequently, those courts did not reach the issue of federal preemption of a state law claim.[10]

Croson also cites the California Court of Appeals' decision in *International Bhd. of Elec. Workers, Local 11 v. Aubry*, 41 Cal. App. 4th 1632, 49 Cal. Rptr.2d 759 (1996), to support its non-preemption assertion. The decision in *Aubry*, however, does not support Croson's claim.

In *Aubry*, the state official vested with the responsibility to enforce California's prevailing wage law determined that the state prevailing wage rates did not include the amount of the employees' wages deposited into a job targeting program. California did not, as Croson's claim herein would have Ohio do, prohibit the deduction of job targeting dues. Significantly, the court in *Aubrey* noted that the California official "did not actually decide whether the job targeting rebates in question here could properly be excluded [from the definition of "general prevailing rate" under California statutes] . . . because he reasoned that such a decision might raise questions of preemption under federal law. . . ." *Aubry*, 41 Cal App. 4th at 1638, 49 Cal. Rptr.2d at 763. Accordingly, the court in *Aubry* expressly stated that "[w]e do not reach any issues arising solely under federal law, such as fed-

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[10] In an Advice Memorandum cited to the court below, the NLRB Division of Advice has agreed that *Reich* is not controlling in determining whether job targeting dues are "membership dues" under the NLRA. *Advice Memorandum, International Bhd. of Elec. Workers, Local 82 (Wagner-Smith Co.)*, Nos. 9-CA-30588, 9-CB-8493, 9-CB-8511 (July 8, 1993).

eral preemption issues, because they have not been briefed and are not properly before us here." *Aubry*, 41 Cal. App.4th at 1638 n.1, 49 Cal. Rptr.2d at 763 n.1. The decision in *Aubry* does not, therefore, support Croson's argument.

IV. THE OHIO SUPREME COURT CORRECTLY DETERMINED THAT *MACHINISTS* PREEMPTION EXCEPTIONS DO NOT APPLY WHEN DETERMINING WHETHER A STATE LAW CLAIM IS PREEMPTED UNDER *GARMON*

As noted above, this Court has articulated two distinct doctrines for NLRA preemption. The second of these doctrines, so-called *Machinists* preemption, prohibits state interference with "conduct that Congress intended to be unregulated" by the Act. *Metropolitan Life Ins. Co.*, 471 U.S. at 749. Because "[t]he NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions," *Metropolitan Life Ins. Co.*, 471 U.S. at 753, state statutes that "alter the balance of bargaining power between labor and management," *Id.* at 751, are preempted under the *Machinists* doctrine. This Court has made clear, however, that "state minimum labor standards" are not among those statutes that alter the balance of bargaining power and, thus, are not preempted *under Machinists*.[11]

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[11] As this Court has stated:

> It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor standards they disfavored." It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by prevent-

Nevertheless, Croson now argues that a "state minimum labor standards" exception to *Machinists* preemption applies to its claim herein. The Ohio Supreme Court correctly noted the flaw in Croson's argument: when the NLRB has ruled that a particular activity is "actually protected" under the NLRA, entirely different considerations —*Garmon* preemption considerations—apply. This Court has never held that when the state seeks to regulate conduct "actually protected" under the NLRA, it escapes federal preemption simply by characterizing its interference as a "minimum labor standard." Consequently, the Court has never applied the *Machinists*' "state minimum labor standards" exception to a *Garmon* preemption case. The Ohio Supreme Court did not, therefore, err by adhering to well-established *Garmon* preemption principles.

Even were this Court to rule that the "minimum labor standards" exception to *Machinists* preemption applies to an analysis of preemption under *Garmon*, the exception would not apply in this case. The Respondents did not assert, and the Ohio Supreme Court did not hold, that any "minimum labor standard," *i.e.*, any provision of the Ohio prevailing wage law or its administrative regulations, were preempted by federal labor law. Rather, the Court merely held that Croson's claim, which the Ohio Supreme Court properly characterized as an attempt "to thwart Local 189's use of its job targeting program," *J.A. Croson Co.*, 81 Ohio St.3d at 355, 691 N.E.2d at 663, App. at 16a, was preempted. Accordingly, the "minimum labor standard" exception to *Machinists* preemption is inapplicable.

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ing them from benefiting from state labor regulations imposing minimal standards on nonunion employers.

Metropolitan Life Ins. Co., 471 U.S. at 755-56 (citation omitted).

V. CROSON'S CLAIM HAS NO APPLICATION BEYOND THE PARTICULAR OHIO STATUTE AND ADMINISTRATIVE REGULATION AT ISSUE HEREIN.

This case does not warrant this Court's review for yet another reason. Croson's claim has no application beyond the particular Ohio statute and administrative regulation at issue herein. A decision by this Court reversing the decision below would not entitle Croson to the relief it requests and would have no effect beyond the particular Ohio statute and administrative regulation at issue.

Initially, it must be observed that Croson's claim is based upon an erroneous interpretation of R.C. 4115.07 and 4115.10(D) and Ohio Adm. Code § 4101:9-4-07. Croson correctly contends that R.C. 4115.07 and 4115.10 (D) *generally* require an employer to pay its employees on Ohio public improvement projects the full prevailing wage without unauthorized deductions or rebates. The sentence omitted by Croson from its "verbatim" reproduction of the statute in its Petition, however, expressly authorizes the deduction of union dues and assessments:

> This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

R.C. 4115.10(D).

To evade the obvious consequences of this sentence, Croson asserts that the administrative regulations adopted under the statute prohibit the deduction of job targeting dues. In particular, Croson argues that Ohio Adm. Code § 4101:9-4-07(B)(6), which permits deductions for "regular union initiation fees and membership dues, *not including* fines or *special assessments* . . ." (emphasis added), necessarily prohibits the deduction of job targeting dues.

To succeed with this argument, and therefore, to prevail on its purported state-law claim, Croson would have

to convince three levels of Ohio courts that the job targeting dues are somehow "special assessments" under the rule. The NLRB, in refusing to issue complaints challenging the withholding of job targeting dues, has repeatedly concluded that such dues are not "additional assessments," but rather are "periodic dues" required of all members. See, e.g., *Advice Memorandum, International Bhd. of Elec. Workers, Local 82 (Wagner-Smith Co.)*, Nos. 9-CA-30588, 9-CB-8493, 9-CB-8511, slip op. at 5-6 (July 8, 1993). Presuming Croson succeeded in convincing the Ohio courts to ignore the express holdings of the NLRB, it would further have to show that such an administrative prohibition did not contravene the statute, which explicitly permits the withholding of "assessments." R.C. 4115.10 (D).[12] The untenable nature of Croson's arguments on the merits of its claim, in and of itself, renders this case unsuitable for review by this Court.

Indeed, the limited nature of Croson's claim belies its assertion of great national significance. Petition at 11-12. Croson is not challenging the establishment or operation of Local 189's job targeting program, but only the withholding of job targeting dues by contractors on public improvement projects subject to the *Ohio* prevailing wage law. Furthermore, Croson has failed to direct this Court's attention to a statute or regulation of any other state or locality that is substantially similar to the regulation that is the lynchpin of its claim herein, Ohio Adm. Code § 4101:9-4-07(B)(6).

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12 Croson would also have to convince the courts that such deductions are not expressly permitted under Ohio Adm. Code § 4101:9-4-07(A)(1), which allows "[a]ny deduction from wages required by federal . . . law . . . ." Local 189 maintains that, having agreed to withhold union membership dues in the collective bargaining agreement, J.A. Guy and other signatory contractors are obligated by federal labor law to withhold all union membership dues for its employees who have signed and submitted valid dues check-off authorization forms.

Thus, Croson fails entirely to establish that this Court's ruling on the preemption of its claim under a specific Ohio administrative regulation will have any applicability outside of Ohio and outside of this lawsuit. Accordingly, this case does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of Ohio should be denied.

Respectfully submitted,

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APPENDIX

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29 U.S.C. § 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Ohio Revised Code § 4115.07 Prohibited Deductions from wages; payroll records; affidavit of compliance.

All contractors and subcontractors required by sections 4115.03 to 4115.16 of the Revised Code, and the action of any public authority to pay not less than the prevailing rate of wages shall make full payment of such wages in legal tender, without any deduction for food, sleeping accommodations, transportation, use of small tools, or any other thing of any kind or description. This section does not apply where the employer and employee enter into an agreement in writing at the beginning of any term of employment covering deductions for food, sleeping accommodations, or other similar item, provided such agreement is submitted by the employer to the public authority fixing the rate of wages and is approved by such public authority as fair and reasonable.

All contractors or subcontractors falling within or affected by sections 4115.03 to 4115.16 of the Revised Code, shall keep full and accurate payroll records with respect to wages paid each employee and the number of hours worked by each employee, covering all disbursements of wages to their employees to whom they are re-

quired to pay not less than the prevailing rate of wages. Such payroll records shall be open to inspection by any authorized representative of the contracting public authority, including the prevailing wage coordinator or the bureau of employment services at any reasonable time and as often as may be necessary, and such records shall not be destroyed or removed from the state for the period of one year following the completion of the public improvement in connection with which the records are made. There shall be posted in a prominent and accessible place on the site of the work a legible statement of the schedule of wage rates specified in the contract to the various classifications of laborers, workmen, and mechanics employed, said statement to remain posted during the life of each contract.

Each contractor or subcontractor shall file with the contracting public authority upon completion of the public improvement and prior to final payment therefore an affidavit stating that he has fully complied with sections 4115.03 to 4115.16 of the Revised Code.

Ohio Revised Code § 4115.10 Prohibitions; penalties paid to employee and department; complaints by employees.

(A) No person, firm, corporation, or public authority that constructs a public improvement with its own forces, the total overall project cost of which is fairly estimated to be more than the amounts set forth in division (B)(1) or (2) of section 4115.03 of the Revised Code, adjusted biennially by the administrator of employment services pursuant to section 4115.034 of the Revised Code, shall violate the wage provisions of sections 4115.03 to 4115.16 of the Revised Code, or suffer, permit, or require any employee to work for less than the rate of wages so fixed, or violate the provisions of section 4115.07 of the Revised Code. Any employee upon any public improvement, except an employee to whom or on behalf of whom restitution is made pursuant to division (C) of section 4115.13 of the Revised Code, who is paid less than the fixed rate

of wages applicable thereto may recover from such person, firm, corporation, or public authority that constructs a public improvement with its own forces the difference between the fixed rate of wages and the amount paid to the employee and in addition thereto a sum equal to twenty-five per cent of that difference. The person, firm, corporation, or public authority who fails to pay the rate of wages so fixed also shall pay a penalty to the administrator of seventy-five per cent of the difference between the fixed rate of wages and the amount paid to the employees on the public improvement. The administrator shall deposit all moneys received from penalties paid to the administrator pursuant to this section into the penalty enforcement fund, which is hereby created. The penalty enforcement fund shall be in the custody of the treasurer of state but shall not be part of the state treasury. The administrator shall use the fund for the enforcement of sections 4115.03 to 4115.16 of the Revised Code. The employee may file suit for recovery within sixty days of the administrator's determination of a violation of sections 4115.03 to 4115.16 of the Revised Code or is barred from further action under this division. Where the employee prevails in a suit, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(B) Any employee upon any public improvement who is paid less than the prevailing rate of wages applicable thereto may file a complaint in writing with the bureau of employment services upon a form furnished by the administrator. At the written request of any employee paid less than the prevailing rate of wages applicable, the administrator shall take an assignment of a claim in trust for the assigning employee and bring any legal action necessary to collect the claim. The employer shall pay the costs and reasonable attorney's fees allowed by the court if the employer is found in violation of sections 4115.03 to 4115.16 of the Revised Code.

(C) If after investigation pursuant to section 4115.13 of the Revised Code, the administrator determines there

is a violation of sections 4115.03 to 4115.16 of the Revised Code and a period of sixty days has elapsed from the date of the determination, and if:

(1) No employee has brought suit pursuant to division (A) of this section;

(2) No employee has requested that the administrator take an assignment of a wage claim pursuant to division (B) of this section;

The administrator shall bring any legal action necessary to collect any amounts owed to employees and the bureau. The administrator shall pay over to the affected employees the amounts collected to which the affected employees are entitled under division (A) of this section. In any action in which the administrator prevails, the employer shall pay the costs and reasonable attorney's fees allowed by the court.

(D) Where persons are employed and their rate of wages has been determined as provided in section 4115.04 of the Revised Code, no person, either for self or any other person, shall request, demand, or receive, either before or after the person is engaged, that the person so engaged pay back, return, donate, contribute, or give any part or all of the person's wages, salary, or thing of value, to any person, upon the statement, representation, or understanding that failure to comply with such request or demand will prevent the procuring or retaining of employment, and no person shall, directly or indirectly, aid, request, or authorize any other person to violate this section. This division does not apply to any agent or representative of a duly constituted labor organization acting in the collection of dues or assessments of such organization.

(E) The bureau shall enforce sections 4115.03 to 4115.16 of the Revised Code.

(F) For the purpose of supplementing existing bureau resources and to assist in enforcing division (E) of this

section, the administrator may contract with a person registered as a public accountant under Chapter 4701. of the Revised Code to conduct an audit of a person, firm, corporation, or public authority.

Ohio Adm. Code § 4101:9-4-07 Permissible payroll deductions.

(A) The following deductions from wages may be made without application to and approval of the bureau:

(1) Any deduction from wages required by federal, state, or local law;

(2) Any deduction of amounts required by court order, process, or judgment to be paid to another unless collusion or collaboration exists between the employer and the employee for whose benefit the deduction is made;

(3) Any deduction which constitutes a contribution by the employee to funds, plans, or programs established by the employer or representatives of employees, or both, for the purpose of providing either from principal or income, or both, medical or hospital care, pensions or annuities on retirement, death benefits, compensation for injuries in addition to that required by Chapters 4121, and 4123. of the Revised Code, compensation for illness, accidents, sickness, or disability, or for insurance to provide any of the foregoing, or unemployment benefits in addition to those required by Chapter 4141. of the Revised Code or vacation pay.

(B) The following deductions from wages may be made only if, prior to commencement of work by the employee on any project, employers procure and maintain, in writing, proof of voluntary deductions signed by the employee:

(1) Savings accounts or similar savings plans for the benefit of employees, their families and dependents;

(2) Any deduction constituting a contribution toward the purchase of United States defense stamps or savings bonds;

(3) Any deduction enabling the employee to repay loans to or purchase shares in credit unions organized and operated in accordance with federal and state credit union statutes;

(4) Any deduction for the making of contributions to governmental or quasi-governmental agencies;

(5) Any deduction for the making of contributions to legitimate charitable institutions;

(6) Any deductions to pay regular union initiation fees and membership dues, not including fines or special assessments, provided that a collective bargaining agreement between the employer and representatives of its employees permits such deductions and such deductions are not otherwise prohibited by law.

(7) Any deduction for the making of contributions to a state or federal political action committee.

(C) Any deduction from wages not specifically permitted in paragraphs (A) and (B) of this rule shall be permitted only upon approval of the public authority and the administrator and must meet the following criteria:

(1) The deduction is not otherwise prohibited by law;

(2) The employer does not make a profit or benefit directly or indirectly from the deduction in any form, including, but not limited to, commissions or dividends;

(3) The deduction is either voluntarily consented to by the employee in writing, prior to the period in which the work is to be done, where such prior consent is not a condition for obtaining or continuing employment, or is provided for in a bona fide collective bargaining agreement between the employer and representatives of its employees; and

(4) The deduciton serves the convenience and interest of the employee, his family or beneficiaries.

(D) Failure to provide evidence of voluntary deductions pursuant to paragraphs (B) and (C) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(E) Failure to attain the approval of the public authority and administrator for any deduction taken pursuant to paragraph (C) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(F) An employer withholding a permissible payroll deduction pursuant to paragraph (A), (B) or (C) of this rule shall maintain complete records of the wages withheld, including any and all receipts for donations, contributions, fees, and dues paid on behalf of the employee, from the deductions withheld by the employer.

(G) Failure to comply with paragraph (F) of this rule constitutes a violation of section 4115.07 of the Revised Code.

(H) Any records required to be maintained by this rule shall be made available to the public authority and the bureau upon request.